

Short Title: GSC Non-Trustee Power Holder Amendments.

A BILL TO BE ENTITLED

AN ACT [TO UPDATE THE DEFINITION OF "TERMS OF A TRUST" AND] TO AMEND
THE ARTICLE ON POWER HOLDERS OF TRUSTS TO EXPAND THE DEFINITION
OF "POWER HOLDER" AND THE POWER OF A POWER HOLDER, TO ELABORATE
ON THE DUTIES AND LIABILITIES OF A POWER HOLDER AND A TRUSTEE, AND
TO PROVIDE DEFAULT RULES REGARDING LIMITATIONS OF ACTIONS
AGAINST POWER HOLDERS, DEFENSES IN ACTIONS AGAINST POWER
HOLDERS, VACANCIES IN THE OFFICE OF POWER HOLDER, AND BONDS OF
POWER HOLDERS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36C-1-105 reads as rewritten:

"§ 36C-1-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee and a power holder under Article 8A of this Chapter, relations among trustees and those power holders, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

(1) The requirements for creating a trust.

(2) The duty of a trustee or a power holder under Article 8A of this Chapter to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except as otherwise provided in subsection (c) of this ~~section~~ section and in G.S. 36C-8A-3 and G.S. 36C-8A-4 with respect to the duty of a power holder and trustee.

- (3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
- (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.
- (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.
- (6) The effect of an exculpatory term under G.S. 36C-10-1008, except as otherwise provided in subsection (c) of this section.
- (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.
- (8) Periods of limitation for commencing a judicial proceeding.
- (9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.
- (10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
- (11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.
- (12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).
- (c) ~~The provisions of subdivisions~~ Subdivisions (2) and (6) of subsection (b) of this section ~~shall do not~~ apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a nonfiduciary ~~capacity under G.S. 36C-8A-3(a) or under the terms of the trust.~~ capacity."

[Staff Note: An alternative approach is to not amend subsection (b) and to rewrite subsection (c) as follows:

"(c) ~~The provisions of subdivisions~~ Subdivisions (2) and (6) of subsection (b) of this section ~~shall not apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a nonfiduciary capacity under G.S. 36C-8A-3(a) or under the terms of the trust.~~ are subject to G.S. 36C-8A-3 and G.S. 36C-8A-4."]

SECTION 2. Article 8A of Chapter 36C of the General Statutes reads as rewritten:

"Article 8A.

"Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a Trustee With Respect to Power Holder's Actions.

"§ 36C-8A-1. ~~Definition.~~ "Power holder" defined.

(a) For purposes of this ~~Article,~~ Article:

(1) ~~the~~ The term "power holder" means a person ~~who~~ described in subdivision (2) of this subsection that under the terms of a trust has the power to take certain actions with respect to a trust and ~~who that~~ is not a any of the following:

a. ~~trustee or a~~ A trustee.

b. A settlor with a power to direct or consent pursuant to G.S. 36C-8-808.

c. A person in which a donor creates a power of appointment.

d. A person that has authority to consent to the exercise of a power of appointment.

e. A beneficiary with a power over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by a beneficiary under G.S. 36C-3-301 through G.S. 36C-3-305 with respect to the exercise or nonexercise of the power.

(2) A power holder may be any of the following:

- 1 a. One or more individuals.
- 2 b. One or more other persons each of which is qualified to exercise trust
3 powers in this State.
- 4 c. Any combination of the persons described in sub-subdivisions a. and
5 b. of this subdivision.

6 (b) A person is a power holder whether or not the terms of a trust refer to the person as a
7 power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section,
8 whether or not the person is a beneficiary or settlor of the trust. A power holder is sometimes
9 referred to as a "trust director."

10 **"§ 36C-8A-2. Powers of a power holder.**

11 (a) The terms of a trust may confer upon a power holder a power to direct or consent to
12 a duty that would normally be required of a trustee, including, but not limited to, a power to direct
13 or consent to the following:

- 14 (1) Investments, including any action relating to investment of all or any one or
15 more of the trust assets that a trustee ~~is authorized to~~ may take under this
16 Chapter.
- 17 (2) Discretionary distributions of trust assets, including distributions to one or
18 more beneficiaries, distribution of one of more trust assets, and termination of
19 the trust by distribution of all of the trust assets.
- 20 (3) Any other matter regarding trust administration, including the transfer of the
21 principal place of administration of the trust.

22 (b) The terms of a trust may also confer upon ~~the~~ a power holder any other power,
23 including, but not limited to, the power to do the following:

- 24 (1) Modify or amend the trust to do any of the following:
- 25 a. Achieve favorable tax status under applicable law.

b. Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.

(2) Remove and appoint trustees and power holders.

(3) Increase or decrease the interests of any beneficiary.

(4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment ~~may~~shall not grant a beneficial interest to any of the following:

a. Any individual or class of individuals not specifically provided for in the trust instrument.

b. The person having the power to grant, modify, or terminate the power of appointment.

c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.

(5) Change the governing law of the trust.

(c) A power holder may exercise any further power appropriate to the exercise or nonexercise of a power granted to the power holder under subsections (a) and (b) of this section.

(d) The powers granted to a power holder under this section are subject to the same provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings that are applicable to a trustee in a like position and under similar circumstances.

"§ 36C-8A-3. Duty and liability of power holder.

~~(a) A power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in good faith and in accordance with the purposes and~~

terms of a trust and the interests of the beneficiaries, except a power holder is not a fiduciary with respect to the following:

- (1) A power to remove and appoint a trustee or power holder.
- (2) A power that constitutes a power of appointment held by a beneficiary of a trust.
- (3) A power the exercise or nonexercise of which may affect only the interests of the power holder and no other beneficiary.

Except as otherwise provided in subsection (f) of this section, a power holder is a fiduciary with respect to the exercise or nonexercise of a power and has the same duty and liability as the following:

- (1) If the power is not held jointly with the trustee or another power holder, as a sole trustee in a like position and under similar circumstances.
- (2) If the power is held jointly with the trustee or another power holder, as a cotrustee in a like position and under similar circumstances.

(b) ~~A power holder is liable for any loss that results from breach of fiduciary duty occurring as a result of the exercise or nonexercise of the power.~~

(c) ~~The following provisions applicable to a trustee shall also be applicable to a power holder with respect to powers conferred upon the power holder as a fiduciary: The provisions regarding the same duty and liability of a power holder as a trustee in a like position and under similar circumstances include all of the following:~~

- (1) ~~The provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings. Article 8 of this Chapter regarding the duties of a trustee.~~
- (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees.

(3) The provisions of Article 9 of this Chapter regarding the uniform prudent investor rule.

(4) The provisions of G.S. 36C-7-703 regarding cotrustees.

(d) Subject to subsection (e) of this section, a power holder shall provide information to a trustee or another power holder to the extent the information is reasonably related both to the powers and duties of a power holder and the powers and duties of the trustee or the other power holder. A trustee or other power holder that acts in reliance on information provided by the power holder is not liable for breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee or the other power holder engages in intentional misconduct.

(e) A power holder does not have a duty to monitor a trustee or another power holder or inform or give advice to a settlor, beneficiary, trustee, or another power holder concerning an instance in which the power holder might have acted differently than a trustee or another power holder. By taking the action described in this subsection, the power holder does not assume the duty excluded under this subsection.

(f) The terms of a trust may provide that a power holder is a nonfiduciary with respect to the exercise or nonexercise of a power, including the power to achieve the settlor's tax objectives under the Internal Revenue Code. Unless the terms of a trust provide otherwise, the power to remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary capacity.

"§ 36C-8A-4. Duty and liability of trustee.

(a) If the terms of a trust confer upon a power holder the power to direct certain actions of the trustee, the trustee ~~must~~ shall act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the ~~direction~~ direction, unless compliance with the direction constitutes intentional misconduct on the part of the trustee.

(b) If the terms of a trust confer upon the power holder the power to consent to certain actions of the trustee, and the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the power holder's consent, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure to take any action that required the power holder's consent.

(c) If the terms of a trust confer upon ~~the person~~ a power holder a power other than the power to direct or to consent to the actions of the trustee, trustee described in G.S. 36C-8A-2(a), the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

~~(d) The trustee has no duty to monitor the conduct of the power holder, provide advice to the power holder, or consult with the power holder. The trustee is not required to give notice to any beneficiary of any action taken or not taken by the power holder whether or not the trustee agrees with the result. Administrative actions taken by the trustee for the purpose of implementing directions of the power holder, including confirming that the directions of the power holder have been carried out, do not constitute monitoring of the power holder nor do they constitute participation in decisions within the scope of the power holder's authority. A trustee does not have a duty to monitor a power holder or inform or give advice to a settlor, beneficiary, trustee, or power holder concerning an instance in which the trustee might have acted differently from a power holder. By taking an action described in this subsection, a trustee does not assume a duty excluded by this subsection.~~

(e) Subject to subsection (d) of this section, a trustee shall provide information to a power holder to the extent the information is reasonably related both to the powers and duties of the trustee and the powers and duties of the power holder. A power holder that acts in reliance on information provided by a trustee is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the power holder engages in intentional misconduct.

"§ 36C-8A-4.1. Limitations of actions against power holder for breach of trust.

In an action against a power holder for breach of trust, the same limitations of actions apply to the power holder that apply under G.S. 36C-10-1005 to an action for breach of trust against a trustee in a like position and under similar circumstances.

"§ 36C-8A-4.2. Defenses in action against power holder.

In an action against a power holder for breach of trust, the power holder may assert the same defenses that a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee, including all of the following:

- (1) Reasonable reliance on the terms of a trust pursuant to G.S. 36C-9-901(b) and G.S. 36C-10-1006.
- (2) Reasonable care in ascertaining the happening of an event affecting the administration or distribution of a trust pursuant to G.S. 36C-10-1007.
- (3) Beneficiary's consent, release, or ratification pursuant to G.S. 36C-10-1009.

"§ 36C-8A-5. Compensation and reimbursement of expenses of power holder.

A power holder as a fiduciary is entitled to compensation and reimbursement of expenses as provided in G.S. 32-59.

"§ 36C-8A-6. Jurisdiction over power holder.

(a) By accepting appointment to serve as a power holder with respect to a trust having its principal place of business in this State, or by moving the principal place of administration to this State, the power holder submits personally to the jurisdiction of the courts of this State regarding any matter involving action or inaction of the power holder.

(b) This section does not preclude other methods of obtaining jurisdiction over a power holder.

"§ 36C-8A-7. Accepting or declining the appointment as power holder.

(a) A person designated as a power holder accepts the appointment to serve as a power holder:

(1) By substantially complying with a method of acceptance provided in the terms of a trust; or

(2) If the terms of a trust do not provide a method or the method provided in the terms of a trust is not expressly made exclusive, by exercising powers or performing duties as a power holder or otherwise indicating acceptance of the appointment to serve as a power holder.

(b) A person designated as a power holder may reject the appointment to serve as a power holder. A trustee may give written notice to a power holder requesting acceptance of the appointment as power holder. A power holder who does not accept such appointment within 120 days after receipt of such notice is considered to have rejected the appointment to serve as a power holder.

"§ 36C-8A-8. Powers of trustee in the absence of a power holder. Vacancy in the office of the power holder.

(a) If a vacancy occurs in the office of the power holder because the power holder fails or ceases to act for any reason, all of the following apply:

(1) If one or more power holders remain in office, a vacancy in the office of the power holder need not be filled.

(2) If the terms of the trust provide for a successor to the power holder, the person designated by the terms of the trust or appointed under the terms of the trust shall act as the successor power holder.

(3) The During the time when a vacancy occurs, the trustee shall be vested with any fiduciary power or duty conferred upon a the power holder by the terms of a the trust that are described in G.S. 36C-8A-2(a) during the time when no

~~power holder is available to exercise such power or perform such duty because
of absence, illness, or other cause. G.S. 36C-8A-2(a).~~

(4) The court may appoint a power holder whenever the court considers the
appointment necessary for the administration of the trust.

(b) A successor power holder shall succeed to all the powers and is subject to the duties
and liabilities that were imposed upon the original power holder, unless a contrary intent appears
from the governing instrument.

"§ 36C-8A-9. More than one power holder.

When there is more than one power holder authorized to act, and they are unable to reach a
unanimous decision, they may act by majority decision. Unanimity is required when only two
are authorized to act.

"§ 36C-8A-10. Resignation of power holder.

(a) A power holder may resign upon either of the following conditions:

(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the
settlor, if living, and all trustees.

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions
reasonably necessary for the protection of the trust property.

"§ 36C-8A-11. Removal of power holder.

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable
trust, a trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the
court to remove a power holder, or a power holder may be removed by the court on its own
initiative.

(b) The court may remove a power holder under any of the following circumstances:

(1) The power holder has committed a serious breach of trust.

(2) Lack of cooperation with the trustee substantially impairs the administration of the trust.

(3) Because of unfitness, unwillingness, or a persistent failure of the power holder to exercise effectively the duties and powers conferred upon the power holder the court determines that removal of the power holder best serves the interests of the beneficiaries.

(4) There has been a substantial change of circumstances, the court finds that removal of the power holder best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable successor power holder is available.

(c) Pending a final decision on a request to remove a power holder, or in lieu of or in addition to removing a power holder, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"§ 36C-8A-12. Power holder's bond.

(a) A bond shall be required for the performance of the power holder's duty only if the terms of a trust require the power holder to provide a bond.

(b) If no bond is required, the provisions of G.S. 36C-7-702(a)(3) and (4) applicable to a trustee apply to the power holder, but in no event shall a bond be required of a power holder if the terms of a trust require otherwise.

(c) If a bond is required, the provisions of G.S. 36C-7-707(b) and (c) applicable to a trustee apply to the power holder."

SECTION 3. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 4. This act is effective when it becomes law and applies to trusts created before, on, or after that date.

POSSIBLE ADDITIONAL AMENDMENT

[**SECTION #.** G.S. 36C-1-103 reads as rewritten:

"§ 36C-1-103. Definitions.

The following definitions apply in this Chapter:

- (1) Action. – When applicable to an act of a trustee, includes a failure to act.
- (2) Ascertainable standard. – A standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- (3) Beneficiary. – A person who:
 - a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer, but excluding a permissible appointee of a power of appointment; or
 - b. In a capacity other than that of trustee, holds a power of appointment over trust property.
- (4) Charitable trust. – A trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).
- (5) Environmental law. – A federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
- (6) General guardian. – As defined in G.S. 35A-1202(7).
- (7) Guardian of the estate. – As defined in G.S. 35A-1202(9).

- (8) Guardian of the person. – As defined in G.S. 35A-1202(10).
- (9) Interests of the beneficiaries. – The beneficial interests provided in the terms of the trust.
- (10) Internal Revenue Code. – The Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.
- (11) Jurisdiction. – When applicable to a geographic area, includes a state or country.
- (12) Person. – An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (13) Power of withdrawal. – A presently exercisable general power of appointment other than a power:
- a. Exercisable by a trustee and limited by an ascertainable standard; or
 - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (13a) Principal place of administration. – The trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee has no usual place of business. In the case of cotrustees, the principal place of administration is one of the following:
- a. The usual place of business of the corporate trustee if there is a corporate cotrustee.
 - b. The usual place of business or residence of any of the cotrustees if there is no corporate cotrustee.

- (14) Property. – Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
- (15) Qualified beneficiary. – A living beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following apply:
- a. Is a distributee or permissible distributee of trust income or principal.
 - b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate.
 - c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (16) Revocable. – When applicable to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
- (17) Settlor. – Except as otherwise provided in G.S. 36C-8B-25, a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
- (18) Spendthrift provision. – A term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.
- (19) State. – A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) Terms of a trust. – Any of the following:

a. ~~The~~ Except as otherwise provided in sub-subdivision b. of this subdivision, the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established [by other evidence that would be admissible] in a judicial proceeding.

b. The trust's provisions, as established, determined, or amended by any of the following:

1. A trustee or other person in accordance with applicable law.

2. A court order.

3. A nonjudicial settlement agreement under G.S. 36C-1-111.

(21) Trust instrument. – An instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) Trustee. – Includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts."]

[Staff Note: The Official Comment to the definitions section of the Uniform Directed Trust Act provides, in part:

"The definition of "terms of a trust" in paragraph (8) updates the comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and nonjudicial settlement agreements, both of which are of growing practical significance and are sometimes used to vary the terms of a trust from a settlor's original intent. The definition also takes notice of a power in a trustee or a trust director to modify the terms of a trust.

The expanded definition of "terms of a trust" in this paragraph is consistent with the Restatement, which recognizes the possibility that the terms of a trust may later be varied from the settlor's initial expression. See Restatement (Third) of Trusts § 76 cmt. b(1) (2007) ("References ... to the terms of the trust ... also refer to trust terms as reformed or modified by court decree, and as modified by the settlor or others or by consent of all beneficiaries.") (internal cross-references omitted)."

The Official Comment to the 2018 Amendment to the definitions section of the Uniform Trust Code provides:

"Section 103(18) was amended in 2018 to conform to the more detailed definition of "terms of a trust" used in the Uniform Directed Trust Act. The revised definition acknowledges the

1 *possibility that the terms of a trust may change over time at the direction of a court, by nonjudicial*
2 *settlement agreement, or in accordance with applicable law, such as by a decanting under the*
3 *Uniform Trust Decanting Act (2015), or by a third party, such as under the Uniform Directed*
4 *Trust Act (2017)."*

5
6 *The North Carolina Comment to G.S. 36C-1-103 provides, in part:*

7 *"In paragraph (20) the definition of "terms of a trust" was modified in order to exclude from*
8 *the definition such manifestation of the settlor's intent as may be established "by other evidence*
9 *that would be admissible" in a judicial proceeding. As revised the phrase "terms of a trust"*
10 *includes only actual provisions of the trust agreement and any provisions established in a judicial*
11 *proceeding. Although the drafters agreed with the statement in the Official Comment that "[o]ral*
12 *statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under*
13 *which the trust is being administered ... all may have a bearing in determining the trust's*
14 *meaning", the drafters concluded that such indications of the trust's meaning should not result*
15 *in changes or additions to the terms of the trust until the court so ruled in a judicial proceeding."*